

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROSITA H. SMITH, individually and on
behalf of all similarly situated Washington
State Residents,

Plaintiffs,

v.

LEGAL HELPERS DEBT
RESOLUTION, LLC, a Nevada limited
liability company, JEM GROUP, INC., a
Nevada corporation, MARSHALL
BANKS, LLC, a California corporation,
JOHN and JANE DOES 1-10,

Defendants.

CASE NO. 11-5054 RJB

ORDER ON MOTIONS TO DISMISS

This matter comes before the Court on Defendants Legal Helpers Debt Resolution, LLC's ("Legal Helpers") Renewed Motion to Dismiss Class Action Complaint (Dkt. 56) and JEM Group, Inc.'s ("JEM") Renewed Motion to Dismiss Class Action Complaint (Dkt. 58). The Court has considered the pleadings filed regarding the motions, the remaining record, and is fully

1 advised. Oral argument was requested, but would not be useful to the Court in deciding the
2 motions.

3 In late January 2011, Plaintiff filed this putative class action against Defendants, who
4 Plaintiff alleges are “for-profit ‘debt-relief’ companies” that solicit consumers for debt settlement
5 programs. Dkt. 1. Plaintiff asserts that Defendants charged her, and other similarly situated
6 Washington consumers, fees that exceed 15% of the consumer’s total debt - the limit set by the
7 Washington Debt Adjusting Act, RCW 18.28, *et seq.*, (“DAA”). *Id.* Plaintiff makes claims for
8 violations of the DAA and Washington’s Consumer Protection Act, RCW 19.86, *et. seq.*,
9 (“CPA”), for breach of fiduciary duty, unjust enrichment, aiding and abetting violations of the
10 DAA and CPA, and civil conspiracy. *Id.* Plaintiff seeks injunctive and declaratory relief,
11 damages, attorneys’ fees, and costs. *Id.* In the pending motions, Defendants Legal Helpers and
12 JEM move to dismiss the Complaint pursuant to Fed. R. Civ. P. 12 (b)(6) for failure to state a
13 plausible claim for relief. Dkts. 56 and 58. Plaintiff opposes the motions. Dkts. 74-75. For the
14 reasons set forth below, the motions to dismiss should be denied.

15 I. FACTS AND PROCEDURAL HISTORY

16 A. FACTS

17 Defendant Marshal Banks, according to the Complaint, is a “front end” debt relief
18 company, who markets debt relief programs to consumers in Washington and provides “lead
19 generation” for other for-profit debt relief companies. Dkt. 1, at 4. It alleges that Marshal Banks
20 “had no capacity to perform debt relief services” at the time they marketed these debt reduction
21 programs to Plaintiff and the putative class. *Id.* The Complaint alleges that on March 1, 2010,
22 Marshal Banks, representing itself as “Kazlow and Tucker Debt Relief, LLC,” sent Ms. Smith a
23 document entitled “Debt Settlement Agreement” and associated paperwork. Dkt. 1, at 7. The
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1 Debt Settlement Agreement provided that Marshal Banks would attempt to reduce the principal
2 balance of Ms. Smith's unsecured debts and settle those debts. *Id.* at 7. The Debt Settlement
3 Agreement required Ms. Smith to designate a third-party custodian to receive payments and then
4 those funds would be used to pay off her debts and used for various fees associated with
5 participation in the program. *Id.* The Complaint alleges that the Debt Settlement Agreement
6 required the payment of several fees, including a service fee, equal to 17% of the total debt, in
7 addition to other charges. *Id.*, at 7-8. The Debt Settlement Agreement is alleged to have a
8 provision allowing Marshal Banks to assign the services to be provided under the contract. *Id.*,
9 at 10. On March 31, 2010, Ms. Smith signed the Debt Settlement Agreement and returned it to
10 Marshal Banks. *Id.*, at 7. (In later pleadings, Marshal Banks acknowledges that "the March 31,
11 2010, documents sent to Plaintiff were sent in error and, based on Marshal Banks information
12 and belief, not implemented." Dkts. 87, at 2-3; and 88 at 2. Marshal Banks states that, "[i]t
13 believes the documents were sent to Plaintiff in error over employee confusion arising from
14 Marshal Banks' business with [Legal Helpers] verses its business with NationWide," (another
15 firm for which Marshal Banks acts as a marketer). Dkts. 87, at 3; and 88, at 2-3.)

16 In any event, the Complaint alleges that a few days later, in April of 2010, Marshal Banks
17 sent Ms. Smith another multiple page "standardized enrollment packet." *Id.*, at 11. Marshal
18 Banks purportedly instructed Ms. Smith to execute all the documents and return them. *Id.*
19 Included in the packet was an "Attorney Retainer Agreement" ("ARA"). *Id.*

20 The ARA is purported to be an "agreement for legal services entered into" solely between
21 Ms. Smith and Defendant Legal Helpers ("also known as the law firm of Macey, Aleman, Hyslip
22 & Searns") and not a contract with any individual, partner, member, or employee of Legal
23 Helpers. *Id.*, at 11 and 14. The Complaint alleges that Legal Helpers is "in the business of
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1 | lending its name to multiple front-end and back-end for profit debt relief companies to create a
2 | fiction that the subject debt relief services are being performed by attorneys.” *Id.*, at 4. The
3 | Complaint alleges that Legal Helpers “has no capacity to perform those debt relief services” and
4 | is “principally in the business of associating itself with debt relief programs marketed by
5 | numerous for-profit debt relief companies and/or debt relief lead generators, including the debt
6 | relief programs of Marshal Banks and JEM.” *Id.*, at 10. According to the Complaint, the legal
7 | services recited in the ARA were “recited for purposes of creating an illusion that the debt relief
8 | services constitute the practice of law or are being performed solely incidental to the practice of
9 | law.” *Id.*, at 13. Plaintiff alleges that the ARA’s “[r]ecited legal services are either not
10 | performed, not performed by an attorney authorized to practice law in Washington, or performed
11 | solely incidental to the debt relief program contracted for by consumers.” *Id.*

12 | JEM, according to the Complaint, is a “back end” debt adjustment company that
13 | “implements, manages, and maintains debt relief programs.” Dkt. 1, at 4. JEM is alleged to
14 | “perform substantially all of the activities necessitated by consumers having contracted with
15 | [Legal Helpers] through the execution” of the ARA. *Id.*, at 15. The Complaint alleges that the
16 | ARA is really a contract for the “engagement of JEM in respect of managing, counseling,
17 | settling, prorating, or liquidating of the indebtedness of a debtor and/or involving receiving funds
18 | for the purpose of distributing said funds among creditors in partial payment of obligations of a
19 | debtor.” *Id.* “[A]ttorneys at Legal Helpers do not control the method, manner, or means by
20 | which JEM performs debt relief activities” or “otherwise directly supervise or control those
21 | activities” according to the Complaint. *Id.*, at 16.

1 The Complaint alleges that the ARA provided for an “initial fee of five hundred dollars
2 (\$500.00), a monthly maintenance fee of forty-nine dollars (\$49.00), and fees of fifteen percent
3 (15%) of the clients’ total scheduled debt for services to be performed by JEM.” *Id.*, at 14.

4 **B. PROCEDURAL HISTORY**

5 On October 24, 2011, Defendants’ motions for an order compelling arbitration was
6 denied. Dkt. 95. The arbitration clause was severed from the ARA because it was
7 unconscionable. *Id.*

8 Parties sought and were granted extensions of time to complete discovery and file various
9 other motions. Dkt. 90. The deadline for Plaintiff to file her motion for certification of a class, if
10 any, is now set for February 24, 2012. *Id.* Trial is set to begin on October 15, 2012. *Id.*

11 **C. PENDING MOTIONS**

12 Defendant Legal Helpers now move for dismissal of the Complaint arguing that the DAA
13 and CPA claims should be dismissed because they are lawyers and the DAA exempts lawyers,
14 and if the DAA is applied as Plaintiff urges, it is unconstitutional, in part, “as an impairment of
15 contracts” and “as a violation of due process.” Dkts. 56 and 83. Legal Helpers moves for
16 dismissal of Plaintiff’s unjust enrichment, aiding and abetting, civil conspiracy, and breach of
17 fiduciary duty claims, arguing that Plaintiff has failed to state plausible claims for relief. *Id.*
18 Legal Helpers also argues Plaintiff’s class claims are not plausible. *Id.*

19 Defendant JEM also moves for dismissal of the Complaint, arguing that the DAA claim
20 should be dismissed as against it because it provides “contracted for law-related services to
21 [Legal Helper’s] clients” and so are exempt, and challenges the constitutionality of the DAA.
22 Dkts. 58 and 86. It argues that Plaintiff’s claims for unjust enrichment, aiding and abetting, and
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1 civil conspiracy should also be dismissed under Fed. R. Civ. P. 12(b)(6). *Id.* JEM also moves to
2 dismiss Plaintiff's class claims. *Id.*

3 Plaintiff opposes the motions to dismiss. Dkts. 74 and 75. She argues that she has pled facts
4 to state plausible claims that Defendants violated the DAA and CPA. *Id.* She argues the DAA's
5 exemptions do not apply to Defendants. *Id.* She argues she has asserted sufficient facts to
6 support her remaining claims. *Id.* Plaintiff argues that Defendants' arguments related to class
7 certification are premature and meritless. *Id.*

8 This opinion will first address the motions to dismiss Plaintiff's DAA and CPA claims, then
9 Plaintiff's unjust enrichment, aiding and abetting and civil conspiracy claims. Lastly, this
10 opinion will address the arguments raised in the motions related to the class claims.

11 **II. DISCUSSION**

12 **A. STANDARD ON MOTION TO DISMISS**

13 Federal Rule of Civil Procedure 8(a)(2) provides that a pleading must contain a "short
14 and plain statement of the claim showing that the pleader is entitled to relief." Under Fed. R.
15 Civ. P. 12 (b)(6), a complaint may be dismissed for "failure to state a claim upon which relief
16 can be granted." Dismissal of a complaint may be based on either the lack of a cognizable legal
17 theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*
18 *Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). While a complaint attacked by a
19 Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation
20 to provide the grounds of his entitlement to relief requires more than labels and conclusions, and
21 a formulaic recitation of the elements of a cause of action will not do. *Bell Atlantic Corp. v.*
22 *Twombly*, 550 U.S. 544, 555 (2007) (*internal citations omitted*).

1 Accordingly, “[t]o survive a motion to dismiss, a complaint must contain sufficient
2 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*
3 *v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(citing *Twombly*, at 570). A claim has “facial plausibility”
4 when the party seeking relief “pleads factual content that allows the court to draw the reasonable
5 inference that the defendant is liable for the misconduct alleged.” *Id.* First, “a court considering
6 a motion to dismiss can choose to begin by identifying pleadings that, because they are no more
7 than conclusions, are not entitled to the assumption of truth.” *Id.*, at 1950. Secondly, “[w]hen
8 there are well-pleaded factual allegations, a court should assume their veracity and then
9 determine whether they plausibly give rise to an entitlement to relief.” *Id.* “In sum, for a
10 complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable
11 inferences from that content, must be plausibly suggestive of a claim entitling the pleader to
12 relief.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

13 If a claim is based on a proper legal theory but fails to allege sufficient facts, the plaintiff
14 should be afforded the opportunity to amend the complaint before dismissal. *Keniston v.*
15 *Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983). If the claim is not based on a proper legal theory,
16 the claim should be dismissed. *Id.* “Dismissal without leave to amend is improper unless it is
17 clear, upon de novo review, that the complaint could not be saved by any amendment.” *Moss v.*
18 *U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009).

19 Further, when ruling on a motion to dismiss, the court may “generally consider only
20 allegations contained in the pleadings, exhibits attached to the complaint, and matters properly
21 subject to judicial notice.” *Colony Cove Properties, LLC v. City Of Carson*, 640 F.3d 948, 955
22 (9th Cir. 2011)(internal citations omitted). Accordingly, no pleadings outside the Complaint
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(there were no attachments to the Complaint) and matters properly subject to judicial notice were considered in deciding the pending motions to dismiss.

B. MOTIONS TO DISMISS PLAINTIFF’S DAA AND CPA CLAIMS

Washington’s DAA is “a remedial statute enacted to stem the numerous unfair and deceptive practices rife in the growing debt adjustment industry.” *Carlsen v. Global Client Solutions, LLC*, 171 Wash.2d 486, 498 (2011)(*internal citations omitted*). Accordingly, “the debt adjusting statute should be construed liberally in favor of the consumers it aims to protect.” *Id.*

Under the DAA, a “debt adjuster” may charge a reasonable fee for services rendered. RCW 18.28.080(1). It provides, in pertinent part, that “[t]he total fee for debt adjusting services may not exceed fifteen percent of the total debt listed by the debtor on the contract. The fee retained by the debt adjuster from any one payment made by or on behalf of the debtor may not exceed fifteen percent of the payment.” *Id.* Plaintiff alleges in her Complaint that Defendants charged her fees in excess of 15% of the total debt she listed on her contract. Dkt. 1.

“RCW 18.28.185 provides an express civil remedy for violation of the debt adjusting statute: ‘a violation of this chapter constitutes an unfair or deceptive act or practice in the conduct of trade or commerce under [the Consumer Protection Act (CPA),] chapter 19.86 RCW.’” *Carlsen*, at 500 (*quoting* RCW 18.28.185). In Washington,

To establish a violation of the CPA, a private plaintiff must prove five elements: (1) an unfair or deceptive act or practice occurred, (2) the act or practice occurred in the conduct of trade or commerce, (3) the act or practice impacted the public interest, (4) the plaintiff suffered an injury to business or property, and (5) the plaintiff can demonstrate a causal link between the unfair or deceptive act or practice and the injury.

Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Assoc., P.L.L.C., 168 Wash.2d 421, 442 (2010). Accordingly, under RCW 18.28.185, violation of the DAA meets the first element for the CPA claim.

1 In their pending motions, Legal Helpers and JEM raise several challenges to Plaintiff's
 2 argument that they violated the DAA, and argues that the Plaintiff's CPA claim, predicated upon
 3 violations of the DAA, must also fail. Dkts. 56 and 58. Those challenges will be addressed
 4 below.

5 1. Whether the DAA Applies to Legal Helpers and/or JEM?

6 Defendant Legal Helpers contend that, as lawyers, they are exempted from the fee limitations
 7 in the DAA and so Plaintiff's claim against them under the DAA should be dismissed. Dkt. 56.
 8 Defendant JEM argues that it is not subject to the DAA because "it provides contracted for law-
 9 related services to [Legal Helper's] clients." Dkt. 58.

10 In interpreting a statute, we look first to the statute's plain meaning. *Carlsen v. Global Client*
 11 *Solutions, LLC*, 171 Wash.2d 486, 494 (2011)(citing *Dep't of Ecology v. Campbell & Gwinn,*
 12 *LLC*, 146 Wash.2d 1, 11–12 (2002)). The DAA only applies to "debt adjusters." *Id.* Under the
 13 DAA, a "[d]ebt adjuster, which includes any person known as a debt pooler, debt manager, debt
 14 consolidator, debt prorater, or credit counselor, is any person engaging in or holding himself or
 15 herself out as engaging in the business of debt adjusting for compensation." RCW 18.28.010(2).

16 a. *Legal Helpers*

17 The allegations in the Complaint against Legal Helpers are sufficient to conclude that Legal
 18 Helpers are plausibly debt adjusters as defined in the DAA. The Complaint asserts that Legal
 19 Helpers is "in the business of lending its name to multiple front-end and back-end for profit debt
 20 relief companies to create a fiction that the subject debt relief services are being performed by
 21 attorneys." Dkt. 1, at 4. This allegation is sufficient to find that Legal Helpers held themselves
 22 out "as engaging in the business of debt adjusting for compensation." RCW 18.28.010(2).

1 Legal Helpers alleges that the DAA does not apply to them because they are lawyers. A
2 “debt adjuster,” as defined under the DAA, does not include, among others, “[a]ttorneys-at-law,
3 escrow agents, accountants, broker dealers in securities, or investment advisors in securities,
4 while performing services solely incidental to the practice of their professions.” RCW
5 18.28.010(2)(a).

6 The Complaint alleges sufficient facts to conclude the DAA exemption does not apply to
7 Legal Helpers. The Complaint alleges that although the ARA’s recites “legal services,”
8 attorneys at Legal Helpers either did not perform legal services, the recited legal services were
9 “not performed by an attorney authorized to practice law in Washington,” or were “performed
10 solely incidental to the debt relief program contracted for by consumers.” Dkt. 1, at 13. If, as
11 the Complaint alleges, Legal Helpers did not perform any legal services, then the services
12 performed could hardly be “incidental to the practice” of law. If as the Complaint alleges, the
13 legal services were not performed by a Washington attorney, then the DAA’s attorney exemption
14 does not apply. *Bronzich v. Persels & Associates, LLC*, 2011 WL 2119372, at 6 (E.D. Wash.
15 May 27, 2011). In *Bronzich*, the court, in part, considered whether the DAA’s attorney
16 exception applied to non-Washington lawyers. *Id.* It reasoned that:

17 Under Washington Rule of Professional Conduct (RPC) 5.5(b), an attorney who
18 systematically and continuously practices law in Washington and holds himself
19 out as being admitted to practice law in Washington, must be admitted by the
20 Washington State Bar Association (WSBA). The Court determines this
21 admission requirement helps define which attorneys may benefit from the DAA's
22 exemption. It would defy the Washington legislature's intended purpose for the
23 DAA, which was to stop debt-adjusting industry abuses, if non-Washington
24 admitted attorneys benefit from the DAA's services-solely-incidental-to-legal-
practice exemption. . . Accordingly, the Court determines attorneys who
systematically and continuously practice law in Washington without the WSBA's
permission to do so may not benefit from the DAA's services-solely-incidental-to-
legal-practice exemption.

1 *Id.* The Court finds this reasoning persuasive. The *Bronzich* court then considered whether
 2 Washington lawyers, who specialized in “debt adjustment,” as the Complaint alleges Legal
 3 Helpers does here, could rely on the “while performing services solely incidental to the practice
 4 of their professions” exception. *Id.* The *Bronzich* court concluded that the exception does not
 5 apply to lawyers who specialize in debt adjustment. *Id.*, at 7. It noted that the phrase “solely
 6 incidental to” had not been defined by the DAA or by a court considering the DAA. *Id.*, at 6. It
 7 noted that a Tenth Circuit Court had interpreted that same phrase in a different statute (one
 8 regulating investment advisers), as having two components: “[t]o be considered incidental, two
 9 actions or objects must be related in a particular way—the incidental action or object must occur
 10 only as a result of or in connection with the primary. Additionally, the incidental action or object
 11 must be secondary in size or importance to the primary.” *Id.* (quoting *Thomas v. Metro. Life Ins.*
 12 *Co.*, 631 F.3d 1153 (10th Cir.2011)). The *Bronzich* court concluded,

13 Applying this reasoning to the DAA's services-solely-incidental-to-legal-practice
 14 exemption, the Court determines that Washington-admitted attorneys are
 15 exempted if they adjust a debt in connection with other legal services. Therefore,
 16 an attorney specializing in debt adjusting is subject to the DAA because the
 17 attorney's debt adjusting is not “solely incidental to” any legal practice but rather
 18 is the attorney's legal practice.

19 *Id.* This reasoning is also persuasive. The Complaint here has alleged sufficient allegations to
 20 conclude that debt adjusting is the Legal Helper's legal practice, and so the exclusion does not
 21 apply. Contrary to Plaintiff's allegations, Legal Helpers argues that it is “a full service national
 22 consumer law firm with attorneys in forty-nine states, where a part of its practice involves
 23 competent representation in debt resolution services.” Dkt. 56. This assertion is not enough to
 24 prevail in a motion to dismiss, and even if evidence were offered to support this contention, such
 evidence would not be properly considered in deciding a motion to dismiss. Dkt. 56.

b. JEM

1 The allegations in the Complaint are sufficient to conclude that JEM is plausibly a “debt
 2 adjuster.” The DAA defines “[d]ebt adjusting ” as “the managing, counseling, settling,
 3 adjusting, prorating, or liquidating of the indebtedness of a debtor, or receiving funds for the
 4 purpose of distributing said funds among creditors in payment or partial payment of obligations
 5 of a debtor.” RCW 18.28.010(1). The Complaint alleges that JEM performs “substantially all of
 6 the activities necessitated by consumers having contracted with [Legal Helpers] through the
 7 execution” of the ARA. Dkt. 1., at 15. The Complaint alleges that the ARA is really a contract
 8 for the “engagement of JEM in respect of managing, counseling, settling, prorating, or
 9 liquidating of the indebtedness of a debtor and/or involving receiving funds for the purpose of
 10 distributing said funds among creditors in partial payment of obligations of a debtor.” *Id.*

11 JEM argues that the “law-related services are those of [Legal Helper’s] and not JEM.” Dkt.
 12 58. It argues that the “law-related services” it provided were under the direct control and
 13 supervision of Legal Helpers. *Id.* These allegations are unsupported and are contrary to the
 14 factual allegations in the Complaint. Dkt. 1, at 16 (“[A]ttorneys at Legal Helpers do not control
 15 the method, manner, or means by which JEM performs debt relief activities” or “otherwise
 16 directly supervise or control those activities.”) Further, even if Legal Helper’s position is
 17 credited - that it is an agent of Legal Helpers, the Washington Supreme Court has held that
 18 agents of exempted entities are not exempted from the DAA solely because they are agents of
 19 exempted entities. *Carlsen v. Global Client Solutions, LLC*, 171 Wash.2d 486, 498 (2011)
 20 (holding that agent of bank that was exempt under the DAA was not entitled to benefit from the
 21 exemption). The allegations in the Complaint are sufficient to conclude that JEM is a debt
 22 adjuster under the DAA.

23 2. Arguments on Whether the DAA is Constitutional?

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Legal Helpers argues that if the DAA's lawyer exception "solely incidental to the practice of their professions" is interpreted like the *Bronzich* Court urges – that is with two components, that the actions must be related and the incidental action or object must be secondary in size or importance to the primary, the DAA is unconstitutional. Dkt. 56. Legal Helpers and JEM argue that if interpreted in this manner, the DAA is unconstitutional "as an impairment of contracts" and as a "violation of due process." Dkts. 56, at 9 and 58, at 16-20. Legal Helpers also references "equal protections" and the "Privileges and Immunities Clause of Article IV." Dkt. 56, at 10-13.

a. "*Impairment of Contract*"

"The contracts clauses of both the federal and state constitutions prohibit the legislative authority from enacting legislation that impairs existing contractual obligations." *Optimer Intern., Inc. v. RP Bellevue, LLC*, 151 Wash.App. 954, 959 (2009).

Defendants' arguments regarding whether the DAA violates the contracts clauses of the federal and state constitutions is without merit. There is no showing that any of the contracts Defendants complain have been impaired were existing at the time the DAA was passed. *Id.*

b. "*Due Process,*" "*Equal Protection,*" and "*Privileges and Immunities*"

Under the Fourteenth Amendment, no state shall "deprive any person of life, liberty, or property, without due process of law." The Equal Protection Clause prohibits states from denying "any person within in its jurisdiction the equal protection of the laws." Likewise, Article IV, § 2 provides in part, "[T]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Privileges and Immunities Clause bars states from discriminating "against citizens of other states where there is no substantial reason

1 for the discrimination beyond the mere fact that they are citizens of other states.” *Saenz v. Roe*,
 2 526 U.S. 489, 502 (1999).

3 Defendants’ argument, that the DAA violates these various constitutional provisions, is
 4 unavailing. Defendants make no showing that any state action has occurred. With a few
 5 exceptions not applicable here, the constitution protects individuals against actions of the state.
 6 The state is not a party, and no showing has been made that the state has acted, or threatened to
 7 act, against Defendants in any manner. They may be concerned about the state filing charges
 8 under various criminal statutes or the Washington Bar Association taking some sort of action.
 9 However, Legal Helpers and JEM cite no authority for the proposition that they could raise, as a
 10 defense against a private party’s claims pursuant to state statutes and common law, that one
 11 possible interpretation of one of the statutes is unconstitutional, where no state action has
 12 occurred.

13 3. Conclusion

14 Defendants’ motion to dismiss Plaintiff’s DAA and CPA claims should be denied.
 15 Allegations in the Complaint are sufficient to conclude that it is plausible that Legal Helpers and
 16 JEM are “debt adjusters” under the DAA, that no exception applies, and that they violated the fee
 17 provisions of the DAA. Defendants’ constitutional arguments are without merit.

18 **C. MOTIONS TO DISMISS UNJUST ENRICHMENT, AIDING AND** 19 **ABETTING AND CIVIL CONSPIRACY CLAIMS**

20 Defendants Legal Helpers and JEM’s motions to dismiss Plaintiff’s claims for unjust
 21 enrichment, aiding and abetting, and civil conspiracy should be denied.

22 Defendants argue that Plaintiff’s claims for unjust enrichment, aiding and abetting, and
 23 civil conspiracy are all also predicated on Plaintiff’s claim that they violated the DAA, and so
 24 should be dismissed. Dkts. 56, and 58. They raise the same arguments in the context of these

claims – that they are exempt from the DAA and even if they weren't the DAA is unconstitutional. *Id.* As stated above, the allegations in the Complaint are sufficient to conclude that both Legal Helpers and JEM are plausibly debt adjusters, that no exception applies, and that they violated the DAA's fee limitations. Accordingly, to the extent they seek dismissal of these claims under those theories, the motions should be denied. To the extent they move for dismissal of these claims on other grounds, those arguments will be addressed below.

1. Motions to Dismiss Claims for Unjust Enrichment

“Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it.” *Young v. Young*, 164 Wash.2d 477, 484 (2008).

Three elements must be established in order to sustain a claim based on unjust enrichment: a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

Id. (internal citations omitted). Under Washington law, “[a] party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract.” *U.S. for Use and Benefit of Walton Technology, Inc. v. Weststar Engineering, Inc.*, 290 F.3d 1199, 1204 (9th Cir. 2002)(dismissing unjust enrichment claim where Plaintiff had affirmed the validity of the contract).

Defendants argue that because the ARA is a valid contract, Plaintiff's claim for unjust enrichment should be dismissed. Dkts. 56 and 58. Defendants' motion should be denied. Unlike the party in *Weststar*, Plaintiff here alleges that the contract at issue, the ARA, is not a valid contract. Accordingly, at this stage in the litigation, her claim should not be dismissed.

2. Motions to Dismiss Claims for Aiding and Abetting

“RCW 18.28.190 makes it a gross misdemeanor to aid and abet violation of the debt adjusting statute. By criminalizing aiding and abetting, the debt adjusting statute establishes that aiding and abetting its violation is wrongful conduct.” *Carlsen*, at 500. “Because the debt adjusting statute explicitly makes it a wrongful, criminal act to aid and abet violations of the statute's primary requirements for debt adjusters, such as fee limits and disclosure rules, ‘a violation of this chapter,’ as used in RCW 18.28.185, includes such aiding and abetting violations.” *Id.* Accordingly, the *Carlsen* court held that an exempted entity, like the bank there, “still commits a crime and an unfair or deceptive act or practice in the conduct of trade or commerce if it aids and abets a debt adjuster in violating [the DAA’s] requirements.” *Id.*, at 500, n. 5.

Defendants’ motion to dismiss the aiding and abetting claims should be denied for the reasons stated above regarding Plaintiff’s DAA claims. Further, based on the Washington Supreme Court’s holding in *Carlsen*, even if Legal Helpers were an exempt entity, Plaintiff has still alleged sufficient allegations to conclude Defendants “aided and abetted a debt adjuster in violating [the DAA’s] requirements.” *Id.*, at 500, n. 5.

3. Civil Conspiracy

Under Washington law, “[a] conspiracy is a combination of two or more persons who contrive to commit a criminal or unlawful act, or to commit a lawful act for criminal or unlawful purposes.” *Adams v. King County*, 164 Wash.2d 640, 660 (2008)(*internal citation omitted*). For there to be a conspiracy, Plaintiff must allege that the Defendants “entered into an agreement of some kind with the other conspirators to accomplish the object of the conspiracy.” *John Davis & Co. v. Cedar Glen # Four, Inc.*, 75 Wash.2d 214, 223, (1969).

Defendants' motions to dismiss Plaintiff's civil conspiracy claims should be denied. Plaintiff has alleged sufficient facts, if true, to state a plausible claim for civil conspiracy. Plaintiff alleges in the Complaint that the Defendants had an agreed business scheme, whereby Marshal Banks would operate as the front end marketer and then assign the services to be performed under the contract to a third party of its choosing. Dkt. 1, at 10. The Complaint alleges that the Defendants then agreed that Legal Helpers, would lend its name to the front-end and back-end for profit debt relief companies - Marshal Banks and JEM - in order "to create a fiction that the subject debt relief services are being performed by attorneys." Dkt. 1, at 4. The Complaint alleges that Legal Helpers "has no capacity to perform those debt relief services" and is "principally in the business of associating itself with debt relief programs marketed by numerous for-profit debt relief companies and/or debt relief lead generators, including the debt relief programs of Marshal Banks and JEM." *Id.*, at 10. Plaintiff alleges in the Complaint that Legal Helpers then agreed with JEM, by contract, that JEM would perform the debt relief services. *Id.* These allegations are sufficient to conclude that the Defendants entered into an agreement to evade the fee limitations set out in the DAA by hoping to take advantage of the attorney exception.

**D. MOTION TO DISMISS BREACH OF FIDUCIARY DUTY CLAIM
ASSERTED SOLELY AGAINST LEGAL HELPERS**

Under Washington law, to make a claim for breach of a fiduciary duty, a plaintiff must establish that: 1) the defendant had a fiduciary duty to the plaintiff, 2) the duty was breached, and 3) the breach caused plaintiff's damages. *See Senn v. Nw. Underwriters, Inc.*, 74 Wn.App. 408, 414, 875 P.2d 637 (1994). As stated in this Court's prior order denying the motions to compel arbitration, "[i]n much of their daily work, lawyers act as a fiduciary for the client, in that they have a duty to act in and for the client's best interests at all times and to act in complete honesty

1 and good faith to honor the trust and confidence placed in them.” *Kelly v. Foster*, 62 Wash.App.
 2 150 (1991). Generally, “[t]hese duties require full communication and candor, as well as
 3 performance meeting professional standards.” *Id.*

4 Defendant Legal Helpers' motion to dismiss Plaintiff's claim against it for breach of fiduciary
 5 duties should be denied. Plaintiff has alleged sufficient facts which make plausible its' claim for
 6 breach of fiduciary duty against Legal Helpers. For example, Plaintiff alleges that Legal Helpers
 7 partnered with non-lawyer debt adjustment companies for the purpose of evading the fee limits
 8 in the DAA. Dkt. 1. Further, the Complaint alleges that Legal Helpers breached its fiduciary
 9 duty to Plaintiff and the putative class by failing to inform them that Legal Helpers “had a
 10 conflict of interest, including a conflict resulting from its business relationships and agreements
 11 with for-profit debt relief companies, including Marshall Banks and JEM.” Dkt. 1, at 15. The
 12 Complaint alleges that Legal Helpers breached its fiduciary duty to Plaintiff by “placing its own
 13 financial interests above the interests” of Plaintiff, and by “sharing fees with non-lawyers.” *Id.*,
 14 at 20-21. These allegations are sufficient to state a plausible claim for relief.

15 **E. MOTIONS TO DISMISS CLASS CLAIMS**

16 Defendants argue that Plaintiff's Complaint “contains nothing more than a bare recitation of
 17 the language of the class action rule.” Dkts. 56, at 18 and 58, at 13. Plaintiff responds and
 18 argues that Defendants' motions regarding class certification should be denied. Dkt. 74 and 75.
 19 Plaintiff argues that these motions are premature – that they are at odds with the Court's
 20 Scheduling Order. *Id.* Plaintiff argues that the issues raised in the context of these motions to
 21 dismiss are “a preemptive attack” on Plaintiff's upcoming motion for class certification. *Id.*

22 After these motions were filed, the parties entered into a stipulation for extension of
 23 deadlines, including the deadline for Plaintiff to move for class certification. Dkt. 89. Parties
 24

1 stipulated that good cause existed to extend the deadlines, including the deadline for Plaintiff to
2 file the motion for class certification. *Id.*

3 In the interests of fully and fairly considering the class certification on the merits and in
4 accord with the Court's Scheduling Order, Defendants' motions to dismiss the Complaint's class
5 claims should be denied without prejudice. Plaintiff properly points out that these issues should be
6 fully briefed.

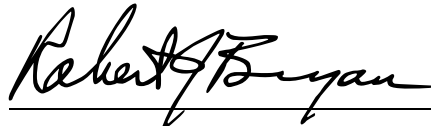
7 **III. ORDER**

8 It is hereby **ORDERED** that:

- 9 • Defendants Legal Helpers Dept Resolution, LLC's Renewed Motion to Dismiss
10 Class Action Complaint (Dkt. 56) and JEM Group, Inc.'s Renewed Motion to
11 Dismiss Class Action Complaint (Dkt. 58):
- 12 ○ **ARE DENIED WITHOUT PREJUDICE AS TO THE CLASS**
 - 13 **CLAIMS, AND**
 - 14 ○ **DENIED AS TO ALL OTHER CLAIMS.**

15 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
16 to any party appearing *pro se* at said party's last known address.

17 Dated this 31st day of October, 2011.

18 

19 ROBERT J. BRYAN
20 United States District Judge
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